BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KATHRYN TRESSEL, Claimant, vs. NORDSTROM DISTRIBUTION CENTER, Employer, Self-Insured, Defendant.	:	File No. 1662439.03 ARBITRATION DECISION Head Notes: 1803, 1808, 2907

STATEMENT OF THE CASE

Kathryn Tressel, claimant, filed a petition for arbitration against Nordstrom Distribution Center, as the self-insured employer. This case came before the undersigned for an arbitration hearing on October 26, 2021.

Pursuant to an order from the Iowa Workers' Compensation Commissioner, this case was heard via videoconference using CourtCall. All participants appeared remotely via CourtCall.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 8, Claimant's Exhibits 1 through 10, as well as Defendant's Exhibits A through I. Claimant testified on her own behalf. No other witnesses testified live at the hearing.

The evidentiary record closed at the conclusion of the arbitration hearing. However, counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted and both parties filed briefs simultaneously on December 3, 2021. The case was considered fully submitted to the undersigned on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether the work injury caused permanent disability.

2. If the injury caused permanent disability, the proper date for commencement of permanent disability benefits.

3. If the injury caused permanent disability, whether the injury should be compensated as a scheduled member injury to two listed body parts identified in Iowa Code section 85.34(2)(t) or compensated with industrial disability benefits pursuant to Iowa Code section 85.34(2)(v).

4. If the injury caused permanent disability, the extent of claimant's entitlement to permanent disability benefits, including a claim that claimant is permanently and totally disabled as a result of the work injury.

5. Whether costs should be assessed against either party and, if so, in what amount.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Kathryn Tressel, claimant, is a 37-year-old woman, who resides in Dubuque, Iowa. She did not complete high school but obtained a GED. Ms. Tressel has continued her education and obtained an associate degree in general studies from Northeast Iowa Community College in 2009. In 2020, claimant completed and earned her bachelor's degree in criminal justice through the University of Dubuque. As of the date of the hearing, claimant was enrolled in a communications master's degree program at the University of Dubuque. She receives some accommodations that permit her additional time to take tests, write reports, and she is allowed to record lectures due to stipulated work injuries and limitations resulting from those work injuries.

I find that claimant is likely capable of completing the master's degree program. I find that her ability to retrain will open up additional avenues for employment and advancement. Given her age and proximity to retirement, her motivation to retrain, and her intellectual capabilities, claimant is likely to successfully complete the master's degree program and obtain employment in her chosen field.

Ms. Tressel's employment background includes work as a sales associate and photographer at a Sears Portrait Studio, as a baker and cashier at a restaurant, a customer service representative for two different employers, an assistant manager at RadioShack, and her position as a processor for this employer, Nordstrom. Claimant's rate of pay prior to the injury date ranged from $6.50 to $10.00 per hour prior to accepting employment at Nordstrom. (Claimant's Ex. 3, pp. 30-31) Her annualized earnings prior to accepting employment with Nordstrom ranged from $3,409 to $20,960. (Claimant's Ex. 8, p. 67)

Claimant commenced her employment with Nordstrom in April 2011 and earned $18.60 per hour working at Nordstrom. (Claimant's Ex. 3, p. 31) Her annualized

earnings with Nordstrom ranged from $30,460 to $38,850 during her employment. She earned $32,709 in 2018, the last full year of her employment with Nordstrom. (Claimant's Ex. 8, p. 67) Ms. Tressel testified that she worked 40 hours per week at the store, but simple math using her annualized earnings in 2018 and her hourly rate suggests she worked approximately 35 hours per week on average.

In her position as a processor at Nordstrom, claimant processed stock to be put into the stores. She was required to remove packaging, place items on hangers, mark items with prices, and prepare the merchandise for display in the store. Her work required repetitive use of her hands and arms.

On February 14, 2019, Ms. Tressel sustained stipulated work injuries resulting in diagnoses of bilateral carpal tunnel and left de Quervain's syndrome. (Hearing Report) Defendant accepted those injuries and provided necessary medical care for claimant's injuries. Specifically, defendant directed claimant to Erin J. Kennedy, M.D., for medical care.

Dr. Kennedy diagnosed claimant with carpal tunnel syndrome bilaterally as well as radial styloid tenosynovitis. She ordered EMG testing on both arms and attempted physical therapy. (Joint Ex. 2, p. 2) Unfortunately, conservative measures did not resolve claimant's symptoms. Dr. Kennedy referred claimant to an orthopaedic surgeon. Defendant scheduled claimant to be evaluated by David S. Field, M.D.

Dr. Field evaluated claimant on April 30, 2019. He noted that claimant's clinical presentation suggested carpal tunnel syndrome bilaterally. However, he noted that claimant's EMG testing did not confirm the diagnosis. Therefore, Dr. Field attempted an injection into claimant's left wrist for the presumed carpal tunnel syndrome diagnosis. (Joint Ex. 4, p. 44)

Claimant followed up with Dr. Field twice in May 2019 and again on June 11, 2019. Dr. Field opined that claimant's case was "a very difficult case to settle in terms of a diagnosis and treatment plan." (Joint Ex. 4, p. 48) He discharged claimant from his orthopaedic care as of June 11, 2019, suggesting he had nothing else to offer. (Joint Ex. 4, p. 48)

Defendant returned claimant for care through Dr. Kennedy. Dr. Kennedy continued to diagnose claimant with bilateral carpal tunnel syndrome and left radial styloid tenosynovitis. (Joint Ex. 2, p. 15) Defendant authorized a second opinion evaluation with an orthopaedic surgeon, Ericka Lawler, M.D., at the University of Iowa Hospitals and Clinics. (Joint Ex. 6, pp. 66-71) Dr. Lawler evaluated claimant on October 17, 2019 and diagnosed claimant with "left greater than right dequervain[']s and bil carpal tunnel syndrome." (Joint Ex. 6, p. 70) She recommended a steroid injection into claimant's left wrist for the de Quervain's symptoms as well as a thumb splint. (Joint Ex. 6, p. 70)

Dr. Lawler re-evaluated claimant on November 25, 2019. She noted a 40 percent improvement of symptoms as a result of the injection. However, claimant reported ongoing symptoms. (Joint Ex. 6, p. 72) Ultimately, Dr. Lawler recommended surgical release of the left carpal tunnel and left de Quervain's tenosynovitis. (Joint Ex. 6, p. 78)

Dr. Lawler performed the recommended left carpal tunnel release as well as a left de Quervain's release on January 31, 2020. (Joint Ex. 6, pp. 82-83) Dr. Lawler subsequently recommended right carpal tunnel release and took claimant back to surgery to perform the right carpal tunnel release on June 16, 2020. (Joint Ex. 6, p. 94)

Claimant's symptoms resulting in the de Quervain's syndrome were located in the left thumb. The surgical release performed by Dr. Lawler released a sheath that houses a tendon that permits the left thumb to function. However, the situs of the left de Quervain's release is of importance and in dispute. As will be discussed in the conclusions of law section, claimant asserts that the left de Quervain's syndrome is an injury to the left hand. Defendant contends that the de Quervain's is a left arm injury. Therefore, review of the operative note is important and useful.

Dr. Lawler's operative note is located at Joint Exhibit 6 on pages 82 through 84. The pertinent description of her surgical procedure is located at the top of page 84. Dr. Lawler describes her operative procedure for the left de Quervain's syndrome:

> Attention was first turned to the first dorsal compartment. 1 cm proximal to the radial styloid, a 1.5 cm transverse incision was made. Dissection was carried down through the soft tissue using Steven scissors bluntly. Subcutaneous nerves were identified and retracted dorsally to protect them. The compartment is identified. The compartment was incised on its dorsal border using a Beaver blade. This was carried both proximally and distally until the compartment was completely released.

The radial styloid referenced in Dr. Lawler's operative note is the distal end of the radius in claimant's left forearm and wrist.[1] Dr. Lawler notes that her incision was made 1 centimeter proximal to the radial styloid. In other words, Dr. Lawler made her incision for the de Quervain's syndrome 1 centimeter above the distal end of the radius. Put another way, relative to the end of the radius, the incision was made toward the forearm and away from the hand or thumb. A visual depiction of the location of the surgical incision and release can be seen in Defendant's Exhibit I, though I did not necessarily rely upon that exhibit to prove the location or situs of the injury. Rather, I rely upon the description provided by Dr. Lawler.

Dr. Lawler notes that she had to release the compartment both proximally and distally from her incision point. However, this necessarily means that the surgery

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[1] Styloid process is defined as: "A protuberance on the outer portion of the distal end of the radius." Taber's Cyclopedic Medical Dictionary, 14th Edition, page 1381.

performed for claimant's left de Quervain's syndrome included surgical work both toward her thumb and also proximal to the distal end of her left radius (moving upward toward the forearm). Although I acknowledge that the surgical procedure may have crossed the distal end of the radius, at least a portion of the surgical procedure and repair occurred proximal to the distal end of the radius. Accordingly, I find that the situs of the injury is, at least partially, in claimant's left wrist and forearm.

Ms. Tressel testified that both surgeries provided some initial relief. However, she feels as though her physical therapy was cut short, and her symptoms remained through the date of hearing. Claimant continued treating at the University of Iowa Hospitals and Clinics' orthopaedic department through August 31, 2020. On that date, the evaluating physician, Lindsey S. Caldwell, M.D., opined that claimant was healed from the surgical procedures. She noted that claimant was still experiencing symptoms, particularly with repetitive activities and recommended referral back to an occupational medicine physician for further care.

Defendant referred claimant to a different occupational medicine physician at this point. Jonathon M. Fields, M.D. evaluated claimant on November 18, 2020. He obtained EMG's and MRIs of both arms and re-evaluated Ms. Tressel on December 16, 2020. Dr. Fields noted that claimant had normal EMGs in both arms. He also assessed claimant with normal 2-point discrimination in all digits of her hands, identified no swelling and full range of motion in both wrists. Dr. Fields also noted negative Tinel's and Phalen's testing bilaterally. (Joint Ex. 7, p. 122)

Dr. Fields opined that claimant required no further treatment and was at maximum medical improvement as of December 16, 2020. He released claimant to return to full duty work as of December 16, 2020 and indicated that he had "no medical explanation for her reported ongoing symptomatology." (Joint Ex. 7, p. 123) Dr. Fields further opined that claimant sustained no permanent impairment as a result of her injuries, concluding, "There is no basis for an impairment rating." (Joint Ex. 7, p. 123)

After Dr. Fields' full duty release, claimant attempted to return to work at Nordstrom. Unfortunately, claimant could not perform the required duties and testified that she felt distraught. Specifically, she testified she had difficulties lifting and unpacking boxes and could not keep up with her assigned duties. Nevertheless, claimant testified that she returned and worked without restrictions from December 16, 2020 through January 29, 2021. She described experiencing constant pain, requiring ice after her workday, and leaving work crying due to the wrist and hand pain she experienced.

Given her ongoing symptoms and difficulties, the employer authorized a return evaluation with Dr. Kennedy on January 29, 2021. Dr. Kennedy noted claimant's ongoing symptoms and indicated that claimant "returned to full duty but has failed full duty with continued significant pain." (Joint Ex. 2, p. 16) Dr. Kennedy opined that claimant was not at maximum medical improvement, contradicting Dr. Fields' opinion. Dr. Kennedy further noted that Dr. Fields "questions validity and does not have the

benefit of having treated this patient. I have had this benefit and believe she is valid in her symptom report. Inconsistences in rapid grip testing is the result of pain, and fear of pain, not invalidity." (Joint Ex. 2, p. 17) Dr. Kennedy recommended medications that may help with claimant's nerve pain and recommended re-evaluation by Dr. Lawler.

Dr. Kennedy evaluated claimant again in April 2021. She noted that Dr. Lawler recommended no further surgical intervention. Dr. Kennedy recommended a functional capacity evaluation (FCE) be performed. (Joint Ex. 2, p. 21) That FCE was performed on April 20, 2021. The physical therapist noted possible self-limiting behavior but reported work abilities in the sedentary category after testing demonstrated lifting limits of 20 pounds on an occasional basis. (Joint Ex. 2, pp. 25-26)

Following the FCE, Dr. Kennedy declared maximum medical improvement on April 22, 2021. She imposed permanent restrictions at that time that limited claimant to lifting, carrying, pushing, or pulling no more than 10 pounds with both hands occasionally and 5 pounds with either hand. (Joint Ex. 2, p. 39)

On June 3, 2021, Nordstrom issued a termination letter to claimant. In that termination letter, the employer acknowledged the permanent restrictions imposed by Dr. Kennedy. The employer noted that the restrictions would require "elimination of essential job functions," which the employer did not deem reasonable or accommodative for claimant's position as a processor. (Claimant's Ex. 4, p. 48) The employer also noted, "your permanent restrictions would require elimination of essential job functions for all vacant positions at your level." (Claimant's Ex. 4, p. 48) The employer did encourage claimant to apply for an administrative assistant position that would constitute a promotion. (Claimant's Ex. 4, p. 48) Claimant did not follow through on that recommendation.

Claimant obtained an independent medical evaluation performed by Sunil Bansal, M.D. on August 27, 2021. (Claimant's Ex. 1) Dr. Bansal concurred with the diagnoses of bilateral carpal tunnel and left de Quervain's tenosynovitis. He also concurred with the restrictions imposed by Dr. Kennedy. (Claimant's Ex. 1, pp. 11, 14)

Dr. Bansal did not concur with the MMI declarations of either Dr. Fields or Dr. Kennedy. Rather, he opined that maximum medical improvement occurred after the final evaluation by Dr. Lawler on February 25, 2021. (Claimant's Ex. 1, p. 14) Dr. Bansal also opined that claimant sustained permanent functional impairment as a result of her injuries. Specifically, he assigned three percent permanent functional impairment of the whole person as a result of the left carpal tunnel syndrome. He assigned one percent permanent functional impairment of the whole person as a result of the left de Quervain's tenosynovitis, as well as an additional two percent of the whole person as a result of the right carpal tunnel syndrome. (Claimant's Ex. 1, pp. 13-14)

Having considered the various medical opinions in this case, I find the opinions of Dr. Bansal to be most reasonable, credible, and convincing in this evidentiary record. Dr. Kennedy had the advantage of being a long-term treating physician both before and

after the surgical procedures. However, I do not find her delay of MMI until after the FCE is completed to be appropriate and reasonable.

Similarly, I do not find the opinion of Dr. Fields providing an earlier MMI date to be reasonable. Claimant had significant ongoing symptoms and further evaluation and consideration of additional medication management or further surgical intervention was appropriate and reasonable. Instead, I find that Dr. Bansal's assignment of MMI as of the last date of evaluation by Dr. Lawler, February 25, 2021, to be reasonable and appropriate. After that date, no further improvement was anticipated. Accordingly, I accept Dr. Bansal's opinion on this issue and find that claimant achieved MMI on February 25, 2021.

I further accept the opinions of Dr. Kennedy and Dr. Bansal on the issue of permanent restrictions. Claimant attempted to return to work without restrictions after the full-duty release by Dr. Fields. She was unable to perform her full range of job duties without significant increase in symptoms. The full-duty release was not practical and ultimately claimant proved she requires some permanent restrictions. The restrictions offered by Dr. Kennedy and Dr. Bansal are reasonable and appropriate.

Having found that claimant requires permanent work restrictions and that she experienced significant increase in symptoms upon return to work full-duty, I similarly find that she has proven she sustained permanent disability in some amount. Dr. Fields opined that claimant does not qualify for permanent impairment under the AMA Guides, Fifth Edition. While the Guides could be read consistent with Dr. Fields' opinion, I note Dr. Kennedy's critique and criticism that Dr. Fields may not have been aware claimant had negative EMG testing even before surgery on either arm.

For whatever reason, claimant's EMG testing does not demonstrate the clinical findings recorded by Dr. Kennedy, Dr. Field, Dr. Lawler, and Dr. Bansal. In this sense, I find that the permanent impairment rating identified by Dr. Bansal is consistent with the AMA Guides and is more reasonable and consistent with claimant's conditions and ongoing symptoms. I find that claimant has proven she sustained three percent permanent functional impairment as a result of the left carpal tunnel syndrome. Claimant has also proven she sustained one percent permanent functional impairment of the whole person as a result of the left de Quervain's tenosynovitis, as well as an additional two percent of the whole person as a result of the right carpal tunnel syndrome. (Claimant's Ex. 1, pp. 13-14)

Utilizing the Combined Values Chart located on pages 604 and 605 of the AMA Guides, Fifth Edition, I note that a three percent permanent impairment (left carpal tunnel) and one percent permanent impairment (left de Quervain's) combine to four percent permanent impairment of the whole person. This four percent impairment is then combined with the two percent impairment for the right carpal tunnel and results in a six percent permanent functional impairment of the whole person when all of claimant's injuries and conditions are considered. I find claimant proved a six percent

permanent functional impairment of the whole person as a result of the February 14, 2019 work injury.

CONCLUSIONS OF LAW

The initial dispute in this case is whether the February 14, 2019 injury caused permanent disability. Having found the opinions of Dr. Bansal to be the most convincing causation opinions in this record, I also found that claimant proved each of her injuries caused permanent disability. I accepted the opinions and permanent impairment ratings offered by Dr. Bansal as most accurate and convincing. Therefore, I also found claimant proved she sustained two percent permanent functional impairment of the whole person as a result of her right carpal tunnel syndrome. Ms. Tressel similarly proved she sustained a three percent permanent functional impairment of the whole person as a result of the left carpal tunnel syndrome and an additional one percent whole person functional impairment as a result of the left de Quervain's syndrome.

The next dispute that must be resolved is whether the de Quervain's syndrome should be legally categorized as an injury to the left hand or the left arm. Claimant contends that she sustained injuries to the left arm and right arm as a result of the bilateral carpal tunnel syndrome diagnoses. However, she asserts that the left de Quervain's syndrome is an injury to the left hand. Defendant disputes this and argues that the de Quervain's syndrome is an injury to the left arm.

Having reviewed the evidence in this record, I found that the location of the surgery performed for claimant's left de Quervain's syndrome was 1 centimeter proximal to the end of the radius. The radius is clearly a bone in the arm. Therefore, I found that the surgery performed for claimant's de Quervain's syndrome occurred, at least partially, proximal to the hand (i.e., in the wrist).

The Iowa Supreme Court has considered how an injury should be compensated when the injury is arguably between or in either of two body parts. The Court has consistently held that it is the anatomical situs of the permanent injury or impairment which determines how an injury should be compensated. Lauhoff Grain Co. v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943); Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936). An injury occurring proximal to a joint is to be compensated to the more proximal body part. But see Smidt v. JKB Restaurants, L.C., File No. 5067766 (Appeal Dec. 2020) ("I also rejected the deputy commissioner's strict application of the bright line rule that whatever is proximal to the joint should be treated as an unscheduled injury under section 85.34(2)(v)."); Chavez v. MS Technologies, L.L.C., File No. 5066270 (Appeal Sept. 2020); Deng v. Farmland Foods, Inc., File No. 5061883 (Appeal Sept. 2020).

For instance, a hip injury is generally an injury to the body as a whole and not an injury to the leg. The leg extends to the acetabulum or socket side of the hip joint. Lauhoff Grain Co. v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Dailey v. Pooley Lumber

Co., 233 Iowa 758, 10 N.W.2d 569 (1943). Prior to a statutory change in 2017, an injury to the shoulder was considered a body as a whole situation because a shoulder injury extended proximal to the arm. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949).

Perhaps the most instructive case involves a dispute about whether an injury involves the hand or the arm. In Holstein Elec. v. Breyfogle, 756 N.W.2d 812 (Iowa 2008), the Iowa Supreme Court confronted an injury that involved a carpal bone in the wrist. The Court concluded that bones within the wrist are considered part of the arm for compensation purposes because the wrist is proximal to the hand. In making this decision, the Court held that the hand begins at the distal point of the bones of the wrist. Id.

Carpal tunnel syndrome involves structures within the wrist. Wrist injuries are compensated as arm injuries under Iowa Code section 85.34(2)(m). Holstein Elec. v. Breyfogle, 756 N.W.2d 812 (Iowa 2008). Therefore, carpal tunnel syndrome is compensated as an arm injury.

This case involves a similar issue. It is clear from the above that the bilateral carpal tunnel syndromes are compensated to the arm. The question is whether the de Quervain's syndrome is compensated as a hand or arm injury. Having reviewed the evidence submitted, it is clear that the surgical procedure occurred 1 centimeter proximal to the tip of the radius. The distal end of the radius forms part of the wrist and connects with the thumb. As noted above, the hand does not begin until the distal point of the bones in the wrist. The radius is a bone within the arm and its distal end forms part of the wrist. Given that the surgery occurred, at least partially, proximal to the distal end of the radius, I conclude that the de Quervain's surgery occurred, at least partially, in the left wrist. As such, I conclude that the de Quervain's syndrome is an injury to the left arm and is not legally categorized as an injury to the left hand.

Having concluded that the de Quervain's is an injury to the left arm, I conclude that claimant proved injuries to the bilateral arms. Benefits for permanent partial disability of two members caused by a single accident is a scheduled benefit under section 85.34(2)(t); the degree of disability must be computed on a functional basis with a maximum benefit entitlement of 500 weeks. Simbro v. DeLong's Sportswear, 332 N.W.2d 886 (Iowa 1983).

The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998).

When determining the functional loss of a scheduled member injury:

> [T]he extent of loss of percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American [M]edical [A]ssociation, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment ...

Iowa Code section 85.34(2)(x) (2018).

Therefore, I conclude that this case should be compensated on a functional disability method based on claimant's permanent loss of function of the whole person based on an injury to two scheduled member injuries. Id. With this in mind, I accepted the permanent functional impairment ratings of Dr. Bansal as convincing and accurate. I utilized the AMA Guides, Fifth Edition, to combine Dr. Bansal's impairment ratings and found that claimant proved a six percent permanent functional impairment of the whole person as a result of the combined effects of her bilateral carpal tunnel syndrome and her left de Quervain's syndrome.

As noted, claimant's permanent disability for a bilateral scheduled member injury is calculated using 500 weeks. Accordingly, I multiply the 6 percent permanent functional impairment of the whole person by 500 weeks and conclude that claimant is entitled to an award of 30 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(t), (v); Simbro v. DeLong's Sportswear, 332 N.W.2d 886 (Iowa 1983).

However, Ms. Tressel asserts a claim for permanent total disability benefits. Indeed, a worker with a bilateral scheduled member injury may qualify for permanent total disability benefits. Iowa Code section 85.34(2)(t). Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City Ry. Co. of Iowa, 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

I acknowledge the claimant's vocational opinion. Claimant's vocational expert opined that claimant "is now 90% precluded in her ability to obtain employment based upon her past vocational training or experience, current physical limitations." (Claimant's Ex. 2, p. 23) However, claimant's vocational expert also conceded, "Based upon her past academic and current academic performance I would opine that Ms. Tressel demonstrates the ability to retrain." (Claimant's Ex. 2, p. 23) I conclude that

claimant failed to prove by a preponderance of the evidence that she is permanently and totally disabled.

Instead, I found that Ms. Tressel maintains the ability to perform substantially gainful employment in the general labor market. She is young enough and educated enough to seek additional training and employment. In fact, she is currently enrolled in a master's program. Although claimant now carries permanent work restrictions and is limited from many types of employment, I found that she is not permanently and totally disabled when all of the relevant factors are considered. Accordingly, Ms. Tressel's recovery is limited to 30 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(t).

The parties dispute when the permanent partial disability benefits should commence. Iowa Code section 85.34(2) (2017) provides, "Compensation for permanent partial disability shall begin when it is medically indicated that maximum medical improvement from the injury has been reached and that the extent of loss or percentage of permanent impairment can be determined."

I accepted Dr. Bansal's assessment of maximum medical improvement on February 25, 2021. This is the date when claimant's recovery ended, and it was possible to assess her permanent functional impairment. Accordingly, I conclude that the permanent partial disability benefits commence on February 26, 2021. Iowa Code section 85.34(2).

The final disputed issue is whether costs should be assessed against either party. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. In this case, claimant has prevailed and recovered an award of permanent partial disability benefits. I conclude that it is appropriate to assess claimant's costs in some amount.

Claimant introduced her requested costs at Claimant's Exhibit 10. She seeks the cost of her filing fee ($100.00). This is a reasonable cost and is taxed pursuant to 876 IAC 4.33(7).

Ms. Tressel seeks assessment of her functional capacity evaluation with Daryl Short. However, claimant had already submitted to an FCE prior to Mr. Short's FCE. Mr. Short's FCE did not have a significant impact on the outcome of this case. Exercising the agency's discretion, I conclude this is not a cost that should be taxed against the defendant.

Ms. Tressel also seeks assessment of the cost of Dr. Bansal's IME. Dr. Bansal charged $3,488.00 for his evaluation and report. Of that amount, Dr. Bansal assigns $637.00 to his examination and assigned the remaining $2,851.00 to drafting his report. (Claimant's Ex. 10, p. 78) I am skeptical about these charges because Dr. Bansal assigns no charges to his records review, though clearly outlines in his report that he reviewed prior medical records. I suspect that some of these charges were subsumed

within his charges for drafting his report. However, this does not appear to be directly challenged by defendant.

The Iowa Supreme Court held that only that portion of a physician's charges related to drafting a report in lieu of testifying in a case can be assessed as a cost pursuant to 876 IAC 4.33(6). Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839 (Iowa 2015). In this case, I found Dr. Bansal's report to be credible, convincing, and relied upon it for my assessment of permanent disability. In this sense, Dr. Bansal's report was necessary for claimant's success in this case. I conclude it is reasonable to and hereby assess the cost of Dr. Bansal's report ($2,851.00) as a cost pursuant to 876 IAC 4.33(6).

Claimant's final request for cost is for Mr. Davis' vocational assessment and report. Ultimately, I did not rely upon Mr. Davis' report or opinions and found that claimant is not entitled to industrial disability or permanent total disability benefits. Accordingly, the report from Mr. Davis was not relied upon and I conclude it is not reasonable to assess it as a cost.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay claimant thirty (30) weeks of permanent partial disability benefits commencing on February 26, 2021.

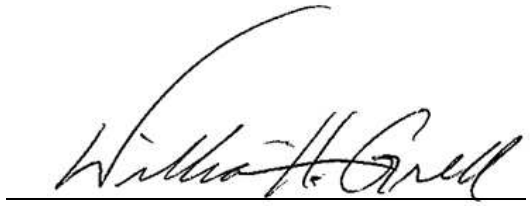
All weekly benefits shall be payable at the stipulated weekly rate of four hundred eighty-six and 66/100 dollars ($486.66) per week.

All past due benefits shall be paid in a lump sum and interest shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Defendant shall reimburse claimant's costs in the amount of two thousand nine hundred fifty-one and 00/100 dollars ($2,951.00).

Defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this _____24th____ day of March, 2022.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Eric Loney (via WCES)

James Peters (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.